Supreme Court, U.S.
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In the

Supreme Court of the United States

OCTOBER TERM, 1997

DELOS M. PALMER, JR., *Petitioner*,
v.
RICHARD G. LaVALLEY and
GERARD ASSOCIATES, INC., *Respondents*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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I. THIS COURT SHOULD ADOPT UNIFORM CRITERIA TO GUIDE THE FEDERAL COURTS IN USE OF STATE CERTIFICATION PROCEDURES

Respondent agrees (Opp. at 4-6) that the federal courts have used widely disparate tests in exercising their sound discretion under *Lehman Bros. v. Schein*, 416 U.S. 386 (1974). Respondent's argument that a few of the state courts have divergent tests (Opp. at 6-8) neither bears scrutiny nor negates our position.

The sound discretion test established almost 25 years ago in *Lehman Bros.* is outdated. In 1974, few states invited certification. Pet. at 9, n.3. Today, all but about a half dozen states have certification procedures (*id.*). Most of the states that do have such procedures apply the two-part test of the Uniform Act: (i) "there are no controlling precedents" in state case law and (ii) the question must be one that "may be determinative of the cause then pending". Pet. at 18. As Petitioner noted (*id.* at 15-16) and as Respondents apparently concede, these criteria are also used for certification in at least five of the federal courts of appeals.

In the face of the our sound policy arguments for adopting a uniform approach across the circuits (Pet. at 17-18), Respondents' argument in support of the existing, highly discretionary "standard" – which amounts to no standard at all – is unavailing. The state cases they cite (Opp. at 7-8) establish no divergence but, instead, prove and advance our argument. Declining certification where the proposed question is (i) only "anticipatory", *National Gypsum Co. v. Wammock*, 353 S.E.2d 809, 811 (GA 1987), (ii) will not

lead directly to judgment, *In re Certified Question*, 549 P.2d 1310, 1311 (WY 1976), (iii) arises from an insufficiently developed record, *Lumbermens Mut. Casualty Co. v. Belleville Indus., Inc.*, 555 N.E. 2d 568, 576 (MA 1990), or (iv) arises prior to entry even of a pretrial order, *Western Helicopter Servs. v. Rogerson Aircraft Corp.*, 811 P.2d 627, 633 (OR 1991), for instance, is entirely consistent with the Uniform Act requirement that the question be one that "may be determinative of the cause then pending." The other cases cited, from Delaware, Arizona[1], and Missouri, similarly have no bearing on the issue here. Respondents' cases and argument support granting the writ of certiorari here, so that this Court may now establish a uniform national test for certification by federal courts. Variations in the tests used by the federal courts are unfair and arbitrary, not principled, as they should be.

Palmer agrees that certification should not be just another avenue of appeal in the ordinary diversity case. When novel or unsettled questions of controlling state law arise, however, they should then be certified to the highest state courts where permitted. Here, despite the clear invitation of the Ohio Supreme Court to certify such questions (Pet. at 23-24), the certification option for obtaining a correct statement of Ohio law was never explicitly considered by the decision panel below. This was done although the motions panel reserved the question and the court then acknowledged the unsettled state of controlling Ohio law. Had the two-part test urged by Petitioner been applied by the

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1 Arizona in fact follows the majority approach, in that it "permits certification to the State's highest court of matters 'which may be determinative of the cause' and as to which 'no controlling precedent' is apparent to the certifying court" *Arizonans for Official English v. Arizona*, 117 S.Ct. 1055, 1075 n. 31 (1997).

Sixth Circuit Court, the Ohio Supreme Court could and would have addressed the question presented.

II. CERTIFICATION SHOULD BE AVAILABLE AT ANY STAGE OF THE PROCEEDINGS IN FEDERAL COURT IN WHICH CONTROLLING BUT UNSETTLED QUESTIONS OF STATE LAW ARISE

Respondents suggest that certification was inappropriate in this case under any test because Petitioner (i) invoked diversity jurisdiction, (ii) opposed certification of an entirely different question proposed by Respondents after they lost in the trial court, and (iii) requested certification only after losing the decision on appeal, and then only in a "buried" passing in his petition for rehearing. These contentions, even to the extent they are accurate, cannot be accepted.

Palmer's rehearing petition below included and emphasized his request for certification to the Ohio Supreme Court, in its title, in its section heading III, and in the Conclusion. Palmer's request was not "buried" in the brief (contrast Opp. p. 1), but was a main point of his petition.

Petitioner opposed only in part Respondents' motion to the Sixth Circuit court for certification of a question to the Ohio Supreme Court. Palmer suggested "a more appropriate question (dispositive at least of the Counts I and II issues)" for any certification. Palmer's Memorandum in Opposition to LaValley's Motion, etc., October 25, 1994, p. 14. In doing so, Palmer noted that "separate and distinct injury" is always *sufficient* for individual standing (in a

shareholder suit or otherwise), but that such proof is not *necessary* in a close corporation of Ohio where fiduciary duties are breached (*Id.*, p. 8). The motions panel left the certification issue to the merits panel (App. C, p. 19a), which then passed over it, twice, without comment.

LaValley himself moved for certification of a question[2] to the Ohio Supreme Court only upon his appeal, after he lost below. Palmer's own motion for certification came after the appeal decision, on his motion for rehearing (*supra*), because the decision unexpectedly read *Crosby v. Beam*, 548 N.E.2d 217 (Ohio 1989), very narrowly to bar not just the misappropriation counts but also the individual attorney malpractice count. Palmer had no reason to seek certification prior to that ruling, since several lower Ohio courts had agreed with Palmer's reading of *Crosby* as it applied to the facts below.

More important than Respondents' inaccurate recitation of the facts of this case is Respondents' fundamental misapprehension of the purpose of certification of a controlling but unsettled question in the first place. As the Ohio Supreme Court has said, certification,

> ensures that federal courts will properly apply state law. * * * It thus strengthens the "federalist structure of joint sovereigns," * * *

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[2] LaValley's effort now to retract his admission that he was the controlling shareholder (Opp. at 10-11, n.4) is belied by the plain text of the question he presented for certification. Accepting LaValley's reading would make that proposed question hypothetical or frivolous, and *not* controlling of the action – an unfathomable result to contend for, then and now.

> and redeems "the promise of liberty," * * * contained in the federal and Ohio Constitutions.

Scott v. Bank One Trust Co., N.A., 577 N.E.2d 1077, 1080 (Ohio 1991) (citations omitted). As this case illustrates, the particular nuances of state law forming the basis for a court's resolution of individual cases are not always apparent at the outset of litigation. Indeed, the ultimate grounds on which a case is decided often depart – sometimes subtly and sometimes radically – from the theories advanced by the parties at trial or even on appellate review. For these reasons, no artificial constraints can be placed on certification, an important procedural device that may be invoked at any stage of proceedings to best ensure the correct result in the case.

A plaintiff's decision to file his suit under federal diversity jurisdiction cannot waive his right to the fair and correct determination of unsettled state law (*compare* Opp. at 4-5). None of the cases cited by Respondent, Opp. at 4-5 and n.2, holds that a diversity plaintiff or a removing defendant is *per se* barred from obtaining certification, and no such rule can or should exist. In *Nieves v. Univ. of Puerto Rico*, 7 F.3d 270 (1st Cir. 1993) (Opp. at 4), movant's theory of the local law squarely conflicted with an express holding of the Puerto Rico high court. The First Circuit court said it would be "unfitting for us to ... enlist the Puerto Rico Supreme Court in her pathfinding effort" to reverse the local law *Id.*, at 278. The court's comments on the plaintiff's choice of a federal forum, chiefly relied on by Respondent here, were *dicta*. The same is true of the pertinent ones of the cases[3] cited by Respondent in n. 1, Opp. at 5.

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[3] *National Bank v. Pearson*, 863 F.2d 322, 326-27 (4th Cir. 1988) involved a settled question under the UCC. The state judge ruled for

Several cases cited in our Petition and not distinguished in the Opposition Brief are directly contrary to Respondents' flat position that diversity plaintiffs waive certification procedures. In *Mosher v. Speedstar Div. of MCA Int'l Inc.*, 52 F.3d 913, 916-17 (11th Cir. 1995), diversity plaintiff lost at trial and on remand, but the appeals court certified a question of Florida law *sua sponte*. In *Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060-61 (6th Cir. 1994), the federal claim was dismissed but a question of state franchise law was certified to the Michigan court. In *Shirley v. Russell*, 69 F.3d 839, 843-44 (7th Cir. 1995), a diversity action for personal injuries, plaintiff won below and the court certified a question of evidence under Indiana statutes. In *East v. Graphic Arts Industry*, 107 F.3d 911, 911 (D.C.Cir. 1997), a local unemployment discrimination case was certified to the D.C. court for answer. Properly, none of these courts considered whether a case originated in federal or

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plaintiff; defendant then removed, the federal trial judge agreed with the state judge, and only on appeal was certification sought.

Jefferson v. Lead Industries Assn., Inc., 106 F.3d 1245, 1248 (5th Cir. 1997), involved dismissal of a diversity case on civil rule 12(b)(6), where plaintiff sought to impose a market share liability theory contrary to state statute. *Tidler v. Eli Lilly & Co.*, 851 F.2d 418, 426 (D.C. Cir. 1988), also involved market share liability issues, plus a choice of law issue. *Chang v. Michiana Telecasting Corp.*, 900 F.2d 1085, 1988 (7th Cir. 1990), and *Seaboard Surety Co. v. Garrison, Webb & Stanaland, P.A.*, 823 F.2d 434, 438 (11th Cir. 1987), both involved well-settled state law. All these diversity plaintiffs lost in the trial courts, their theories unsupported in well-settled state law.

In *Harvey E. Yates Co. v. Powell, 98* 3d 1222, 1229 n.6 (10th Cir. 1996), the state officer defendant removed the case from state court and, after losing in the trial court, was denied certification of a question possibly to extend state law.

state court. Since our judicial system allows for diversity jurisdiction, its use should not deny any citizen correct application of state law, whether that law be settled or unsettled at the outset of the case.

Similarly, a party's waiting until after an adverse ruling cannot *per se* bar him or the federal court from seeking certification. This Court in *Lehman Bros.*, directed certification of an issue of state law although raised by the losing party only after decision, on a motion for rehearing, the same as Palmer's formal motion here. In fact, LaValley himself sought certification below only after he lost both the jury verdict and the judgment. Palmer's motion to certify upon reconsideration was based on the Sixth Circuit's finding that the question of Ohio law decided against Palmer was unclear and unresolved in pertinent part.

Last, Respondents' plea that Ohio law is clear is inconsistent with LaValley's own motion for certification and with the Sixth Circuit's own acknowledgment:

> The Ohio Supreme Court has not addressed the issue of direct versus derivative actions in the circumstances presented by the case before us.

App. A, p. 11a. On certification, the Ohio Supreme Court would consider not only *Crosby* and *McLaughlin v. Beeghley*, 617 N.E.2d 703 (Ohio App. 1992), but the holdings of *Cousins v. Brownfield*, 615 N.E. 1064, 1069-70 (Ohio App. 992), *Terry v. Carney*, 1995 Ohio App. Lexis 5754, *17-18 (Pet. at 22), and others of the lower courts not cited by the Sixth Circuit but bearing on the parties' positions here.

III. CONCLUSION

The petition for a writ of certiorari to the Sixth Circuit Court should be granted.

Respectfully submitted.

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